



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

July 23, 2003

Mr. Dan Junell  
General Counsel  
State Board for Educator Certification  
4616 West Howard Lane, Suite 120  
Austin, Texas 78728

OR2003-5087

Dear Mr. Junell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 184656.

The State Board of Educator Certification ("SBEC") received a request for any and all records related to SBEC's investigation into the abuse and neglect of the requestor's son. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note that you have provided documentation showing you have notified an interested third party of the request for information pursuant to section 552.305 of the Government Code. *See Gov't Code § 552.305* (permitting interested third party to submit to attorney general reasons why requested information should not be released). An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See Gov't Code § 552.305(d)(2)(B)*. As of the date of this letter, the interested party has not submitted to this office reasons explaining why the submitted information should not be released. Thus, we turn to your arguments with respect to the submitted information.

You argue that the submitted information is excepted from disclosure under section 552.111 of the Government Code. A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was 1) created for trial or in anticipation of

civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions, and legal theories. Open Records Decision No. 647 at 4 (1996). Although the attorney work product privilege protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to facts obtained by the attorney. *Id.*

If a requestor seeks an attorney's entire litigation file, and a governmental body seeks to withhold the entire file and demonstrates that the file was created in anticipation of litigation, we will presume that the entire file is excepted from disclosure under the attorney work product aspect of sections 552.103 and 552.111. Open Records Decision No. 647 at 5 (1996) (citing *National Union Fire Insurance Co. v Valdez*, 863 S.W.2d 458, 461 (Tex. 1993)) (organization of attorney's litigation file necessarily reflects attorney's thought processes). You note that the present request encompasses SBEC's entire case file, which was compiled by an investigator and a legal assistant, under the supervision of attorneys, and that the contents and organization of the file are governed by the attorney who is the head of the Professional Discipline Unit.

You state that SBEC enforces standards of conduct for certified educators in Texas public schools, including enforcement of an educator's code of ethics, pursuant to chapter 21 of the Texas Education Code. *See* Educ. Cod § 21.031(a), 21.041(b)(8). You further explain that these enforcement proceedings are subject to the Texas Administrative Procedure Act ("APA"). Educ. Code § 21.047(b)(7). You state that SBEC is currently investigating an educator accused of abusing the requestor's son. Furthermore, you state that the investigator who worked up the case file will refer the matter for litigation and communicate the information therein to a staff attorney for SBEC, who will be assigned to litigate the case under the APA. You have supplied our office with information which shows that an investigation is pending, and that, if appropriate, SBEC will take enforcement action as authorized by statute. Therefore, we find that you have satisfied the first prong of the work product test by demonstrating that the file was created in anticipation of litigation. *See* Open Records Decision Nos. 588 (1991), 301 (1982) (contested case under Administrative Procedure Act, Government Code chapter 2001, constitutes "litigation"). Thus, as the requestor seeks the entire case file, and as you have demonstrated that the file was prepared

in anticipation of litigation, we conclude that SBEC may withhold the submitted information under section 552.111 of the Government Code.<sup>1</sup>

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

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<sup>1</sup>As we are able to make this determination, we need not address your remaining arguments.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Sarah Swanson", with a long, sweeping horizontal line extending to the right.

Sarah I. Swanson  
Assistant Attorney General  
Open Records Division

SIS/lmt

Ref: ID# 184656

Enc. Submitted documents